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JUDGE: M. A. Mahoney

PARTIES: Terry Wayne Nettles, Jeanne Pugh Nettles, Internal Revenue Service

CHAPTER: 13

ATTORNEYS: M. B. Smith, C. Baer

DATE: 4/26/00

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

TERRY WAYNE NETTLES
JEANNE PUGH NETTLES

Case No. 95-11911-MAM-13

Debtors

**ORDER AND JUDGMENT DENYING OBJECTION OF
DEBTORS TO CLAIM OF INTERNAL REVENUE SERVICE**

Michael B. Smith, Mobile, Alabama, Attorney for the Debtors
Charles Baer, Mobile, Alabama, Attorney for the United States of America

This matter is before the Court on the objection of debtors Terry Wayne Nettles and Jeanne Pugh Nettles to the claim of the Internal Revenue Service. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the objection of the debtors is overruled.

FACTS

Terry Wayne Nettles and Jeanne Pugh Nettles filed for relief pursuant to chapter 13 of the Bankruptcy Code on August 1, 1995. The Nettles filed schedules listing the Internal Revenue Service as an unsecured priority claimant in the amount of \$14,000 for taxes due for 1988, 1989, 1990, and 1993. The Nettles valued their interest in real and personal property at \$11,980. Secured claims were listed as attaching to part of this property valued at \$7,200.

The Nettles' chapter 13 plan was confirmed October 2, 1995. Priority and unsecured claimants were to be paid 100% of their claims.

On November 17, 1995, the IRS filed a claim in the amount of \$19,433.62. The Nettles objected. This Court reduced and allowed the claim for \$14,433.62. The IRS moved for reconsideration of the order. On June 4, 1996, the Court amended its order “based upon the evidence and arguments” of the parties and allowed the claim of the IRS as secured in the amount of \$14,433.62 and priority unsecured in the amount of \$1,560.

On November 1, 1999, the Nettles moved to modify their plan to provide 10% pro rata dividends to unsecured creditors and dividends to the IRS equal to 100% of its priority claim for 1993 taxes. The claims of the IRS based on tax years 1988, 1989, and 1990 would be treated as unsecured claims. The IRS objected. The objection was overruled January 5, 2000. The Nettles’ amended chapter 13 plan was confirmed by order dated January 12, 2000. On January 19, 2000, the IRS filed a motion to alter or amend the order confirming the Nettles’ amended plan. The IRS argued that the hearing regarding this issue was mistakenly held January 5, 2000, rather than on its continued hearing date of January 26, 2000. The Nettles filed another motion to amend their plan on January 25, 2000.

The Nettles filed an “Objection to Claim” of the IRS on March 1, 2000. They orally amended this motion to request reconsideration of the claim of the IRS.

LAW

The Nettles initially styled this request as an objection to claim. In recognition of the res judicata effect of the June 4, 1996 order allowing the claim of the IRS, the Nettles orally amended their objection to request reconsideration of the order allowing the claim of the IRS. They contend that reconsideration is proper because the secured claim of the IRS was overvalued. In general terms, the claim of the IRS can be secured only to the extent of the

Nettles' interest in property that was nonexempt and not encumbered by a senior secured creditor. 11 U.S.C. § 506. The Nettles contend that their interest in unencumbered, nonexempt property amounted to approximately \$3,000 when they filed this case. Thus, the secured claim of the IRS should have been set at this amount, not at \$14,433.62.

A claim that has been allowed may be reconsidered pursuant to § 502(j) of the Bankruptcy Code and Fed. R. Bankr. P. 3008. Rule 3008 motions filed within the ten day period during which appeals are permitted are treated as motions under Fed. R. Civ. P. 59 which applies to bankruptcy cases pursuant to Fed. R. Bankr. P. 9023. *Abraham v. Aguilar (Matter of Aguilar)*, 861 F.2d 873, 874 (5th Cir. 1988). A Rule 3008 motion filed after the ten day period to appeal is treated as a motion under Fed. R. Bankr. P. 9024 which incorporates Fed. R. Civ. P. 60. *Id.*; *see, International Yacht and Tennis, Inc. v. Wasserman (In re International Yacht and Tennis, Inc.)*, 922 F.2d 659 (11th Cir. 1991) (applying Rule 60(b) language to § 502(j) motion); *In re Southwest Florida Telecommunications, Inc.*, 234 B.R. 137, 142 (Bankr. M.D. Fla. 1998). The stricter Rule 60(b) standard applies to Rule 3008 motions filed outside the time to appeal in recognition of the importance of the finality of judgments. *Aguilar*, 861 F.2d at 874-75.

The Nettles filed this objection and motion to reconsider the claim of the IRS more than ten days after the order allowing the claim was entered. Therefore, Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60 govern.

Rule 60(b) motions to reconsider based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence or fraud (Rule 60(b)(1)-(3) bases) must be made not more than one year after the order sought to be reconsidered was entered. The basis for the Nettles' motion for reconsideration is excusable neglect, i.e., their counsel mistakenly and in good faith

neglected to present all of their arguments or evidence, *see, Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), or one of the other Rule 60(b)(1)-(3) bases.

Rule 60(b) motions based on excusable neglect or any other part of subsections (1)-(3) must be brought not later than one year after the entry of the order to be reconsidered. An exception is found in Bankruptcy Rule 9024(1). This provision provides that, “a motion . . . for reconsideration of an order allowing or disallowing a claim against the estate entered *without a contest* is not subject to the one year limitation prescribed in Rule 60(b).” (Emphasis added). The Court entered the June 6, 1994 order establishing the claim of the IRS “based upon the evidence and arguments” of the Nettles and the United States on behalf of the IRS. Thus, the order in this case was contested. The Rule 9024(1) exception is inapplicable.

Based on the foregoing, the motion of the Nettles for reconsideration of the order allowing the claim of the IRS is subject to the one year time limit. Therefore, the motion clearly is untimely. It was filed more than three years after the order was entered. *In re Costello*, 136 B.R. 296, 298 (Bankr. M.D. Fla. 1992) (motion for reconsideration filed more than one year after entry of the order was untimely notwithstanding § 502(j)).

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The oral motion of Terry Wayne Nettles and Jeanne Pugh Nettles for reconsideration of the claim of the Internal Revenue Service is DENIED.
2. The March 1, 2000 objection of Terry Wayne Nettles and Jeanne Pugh Nettles to the claim of the Internal Revenue Service is OVERRULED.

3. The January 19, 2000 motion of the Internal Revenue Service to amend the January 12, 2000 order confirming the amended plan is GRANTED and the January 12, 2000 order is set aside.

4. The January 25, 2000 motion of Terry Wayne Nettles and Jeanne Pugh Nettles to modify their confirmed plan is DENIED.

Dated: April 26, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE